91-1067

NO.

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1991

RICHARD SHROY, et al.,

Petitioners

v.

EVELYN SHOOP,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Are Deputy Sheriffs entitled to qualified immunity when they receive an order from the County Election Judge to investigate a disturbance at a polling place on Election Day, perform the investigation, report the results and are subsequently ordered to arrest and remove one of the individuals responsible for the disturbance?

LIST OF PARTIES

Petitioners are Deputy Sheriffs Richard Shroy and Charles C. Fisher. Respondent is Evelyn Shoop.

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OPINION AND ORDERS BELOW

The opinion of the District Court is unreported and is reprinted in the Appendix at pp. 42. The Judgment Order of the Court of Appeals is reprinted in the Appendix at pp. 1a. The order denying rehearing is reprinted in the Appendix at pp. 22a.

STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals was filed on September 6, 1991, and petitioners timely petitioned for rehearing. The Court of Appeals denied rehearing October 4, 1991. The Judgment Order and the Order denying rehearing are reprinted in the Appendix at pp 1a and 22a respectively. The Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

42 U.S.C. §1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

18 Pa. Cons. Stat. §5101. Obstructing administration of law or other governmental function.

> A person commits a misdemeanor of the second degree if he intentionally obstructs, impairs or perverts the administration of law or other governmental function by force, violence, physical interference or obstacle, breach of official duty, or any other unlawful act, except that this section does not apply to flight by a person charged with crime, refusal to submit to arrest, failure to perform a legal duty other than an official duty, or any other means of avoiding compliance with law without affirmative interference with governmental functions. 1972, Dec. 6, P.L. 1482, No. 334, § 1, effective June 6, 1978.

25 P.S. §3527. Interference with primaries and elections; fraud; conspiracy.

> If any person shall prevent or attempt to prevent any election officers from holding any primary or election, under the provisions of this act, or shall use or threaten any violence to any such officer; or shall interrupt or improperly interfere with him in the execution of his duty; or shall block up or attempt to block up the avenue to the door of any polling place; or shall use or practice any intimidation, threats, force or violence with design to influence unduly or overawe any elector, or to prevent him from voting or restrain his freedom of choice; or shall prepare or present to any election officer a fraudulent voter's certificate not signed in the polling place by the elector whose certificate it purports to be; or shall deposit fraudulent ballots in the ballot box; or shall register fraudulent votes upon any voting machine; or shall tamper with any district register, vot-

ing check list, numbered list of voters, ballot box or voting machine; or shall conspire with others to commit any of the offenses herein mentioned, or in any manner to prevent a free and fair primary or election, he shall be guilty of a misdemeanor, and upon conviction thereof, shall be sentenced to pay a fine not exceeding one thousand ($1,000) dollars, or to undergo an imprisonment of not less than six (6) months nor more than five (5) years, or both, in the discretion of the court. 1937, June 3, P.L. 1333, art XVIII, §1827.

25 P.S. §3511. Peace offices; failure to render assistance; hindering or delaying county board members and others.

Any sheriff, deputy sheriff, constable, deputy constable, police or other peace officer, who shall fail upon demand of any member of a county board of elections, judge or inspector of election, or overseer to render such aid and assistance to him as he shall request in the maintenance of peace and in the making of arrests, as herein provided, or who shall willfully hinder or delay or attempt to hinder or delay any member of a county board, judge or inspector of election, or overseer in the performance of any duty under this act, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be sentenced to pay a fine not exceeding five hundred ($500) dollars, or to undergo an imprisonment of not less than three (3) months nor more than two (2) years, or both, in the discretion of the court. 1937, June 3, P.L. 1333, art. XVIII §1811.

STATEMENT OF THE CASE

On Election Day, November 3, 1987, Deputy Sheriffs Shroy and Fisher ("Deputies") arrested Mrs. Evelyn Shoop for unlawfully disrupting the electoral process in Jackson Township. See 18 Pa. Cons. Stat. §5101. Mrs. Shoop's daughter and Mrs. Webster, Plaintiffs with Mrs. Shoop in the court below, were also arrested for assaulting the Deputies during the course of Mrs. Shoop's arrest. The criminal charges against Mrs. Shoop were dismissed at a pre-trial hearing based upon a finding that the Deputies lacked probable cause to arrest her. Mrs. Shoop now alleges that her arrest was unlawful and claims that she is entitled to damages pursuant to 42 U.S.C. §1983. In contrast, the Deputies, Defendants in the court below, contend that they are entitled to qualified immunity from Mrs. Shoop's Section 1983 claims based upon an unlawful arrest because their conduct did not violate any clearly established constitutional law. Moreover, the Deputies contend that the facts of record support, on an objective basis, their reasonable belief that they had probable cause to arrest Mrs. Shoop thereby entitling them to qualified immunity. The Deputies contend that the District Court and Court of Appeals erred in misinterpreting the precedent of this Honorable Court. Accordingly, the Deputies request that this Court grant certiorari to provide the lower courts with guidance on the issues raised herein that have not been, but should be, decided by this Court. A summary of the facts relating to these issues follows.

On Election Day, November 3, 1987, Mrs. Shoop challenged, on the basis of residency, the vote of Ruth and Grant Greider. Mrs. Shoop had challenged the Greiders' right to vote in the May primary on the same grounds. When the Greiders' right to vote was challenged on November 3, 1987, they traveled to the Dauphin County Courthouse in Harrisburg to present their situation to the Dauphin County Election Judge in the hope of receiving an order enabling them to vote. After learning that the Greiders did not currently live in Jackson Township but had lived there for many years and planned to return, the Election Judge issued an order enabling the Greiders to vote in Jackson Township.

During the meeting with the Election Judge, the Greiders represented to the Election Judge that Evelyn Shoop was causing a disturbance, that she was using foul and obscene language and racial epithets. Significantly, Mr. Greider recalls Deputy Sheriff Fisher being present in

the Election Judge's chambers during this meeting. Deputy Sheriff Fisher recalls the meeting and recalls that the Greiders complained about Mrs. Shoop's disruptive conduct.

The Election Judge recalls the meeting with the Greiders. He recalls the substance of the discussion at the meeting as follows:

> ...as I recall, I was told—we first had the problem whether these people [the Greiders] could vote. I said, Yes, they can vote. Then there was this problem of this woman creating the disturbance, as I was told. I believe I inquired as to whether she had the right to be in the polling place. They said, Yes, she's a watcher. I said, that's all right, but that does not mean that she can interfere with people voting. I mean, I think I was told that she was using foul and obscene language, that she was using racial epithets, as I recall. That she was creating a disturbance. I said if that occurs, if she's interfering with the people voting, she's not allowed to do that, ask her to leave and if she doesn't leave, remove her.

After receiving these instructions, the Deputies were ordered to go to the Jackson Township Polls to investigate. Upon their arrival at the polls, they spoke with Mrs. Vallier, the Jackson Township Election Judge. Mrs. Vallier told the Deputies that "the woman [Mrs. Shoop] was causing a disturbance in our polling place. She was harassing voters or bothering voters." The Deputies continued their investigation by corroborating this finding with a fellow deputy sheriff who had been present in the polling place the entire day. Although this deputy sheriff did not elect to intervene himself to quell the disturbance at the polls, he believed that Mrs. Shoop had intentionally disrupted the polls that morning and he communicated his observations and conclusions to the Deputies.

After receiving the information relating to Mrs. Shoop's disturbance at the polls from both the Jackson Township Election Judge and a fellow deputy sheriff, the Deputies related their findings to the Chief Deputy Sheriff by telephone. The Chief Deputy's notes for Election Day 1987 reveal the following:

> After arriving at scene, Deputy Fisher called this office and stated that Mrs. Evelyn Shoop was causing the disturbance, disrupting other voters from voting.

Chief Deputy Sheriff Henderson then conveyed this information to the Election Judge. According to Chief Deputy Sheriff Henderson, the order

was then issued to have Mrs. Shoop arrested and "removed forthwith from the polling place." Chief Deputy Sheriff Henderson stated that he communicated this order to Deputy Sheriff Fisher on at least two separate occasions, once by phone and once by a radio dispatch bulletin. Plaintiffs contend that no order of this kind was ever issued by the Election Judge and that to the contrary, an illegal order was issued by Chief Deputy Sheriff Henderson to arrest and remove Evelyn Shoop. However, there is no material dispute that the Deputies received an order, via telephone and via radio dispatch bulletin, purportedly issued by the County Election Judge, to arrest and remove Evelyn Shoop from the polls.

In view of the foregoing, the Deputies request this Court's assistance in lending clarity to the law applicable to these unique circumstances.

REASONS FOR GRANTING THE WRIT

1. THE DISTRICT COURT AND COURT OF APPEALS ERRONEOUSLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW RELATING TO THE APPLICATION OF QUALIFIED IMMUNITY FROM SECTION 1983 CLAIMS THAT HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

A. The Lower Courts Require Guidance Concerning the "Clearly Established Law" Standard Set Forth in Harlow v. Fitzgerald.

In Harlow v. Fitzgerald, 475 U.S. 800 (1982), this Court held that government officials performing discretionary functions generally are shielded from liability for civil damages in so far as their conduct does not violate "clearly established" statutory or constitutional rights about which a reasonable person would have known. Id. 475 U.S. at 818. In Anderson v. Creighton, 483 U.S. 635 (1987), the Harlow standard was refined in the context of a warrantless search of a residence by FBI agents. The Anderson court articulated the applicable inquiry to determine whether an official acting under color of law is entitled to immunity under Section 1983 as follows:

> The relevant question in this case for example is the objective (albeit fact-specific) question whether a reasonable officer could have believed Anderson's warrantless search to be lawful in light of clearly established law and the information the searching officer possessed. Anderson's subjective beliefs about the search are irrelevant. (Emphasis added.)

Id. 483 U.S. at 640. This court has not gone further to provide the lower courts with guidance as to "how close a factual correspondence is required between applicable precedents and the case at issue." See People of Three Mile Island v. Nuclear Reg. Com'rs., 747 F.2d 139 (3rd Cir. 1984).

In this instance, exhaustive research has failed to uncover an appellate decision discussing the unlawfulness of an arrest under circumstances even remotely similar to those presented here. Nevertheless, both the District Court, and by implication, the Third Circuit, apparently found sufficiently analogous case law to conclude that Mrs. Shoop's arrest violated law that was so clearly established that the Deputies were not entitled to qualified immunity.

The Deputies believe that the District Court and the Third Circuit misinterpreted the standard set forth in Harlow and Anderson. In view of the complete lack of factually applicable precedent, the Deputies question whether a court may properly impose Section 1983 liability under the "clearly established law" standard. This cannot have been the intent of this court in establishing the standard for the application of qualified immunity from Section 1983 liability. Accordingly, further guidance from this court on this issue is requested.

The clarity of Pennsylvania law under the facts of this case is placed into further question by a conflict between the applicable statutes. Under Pennsylvania law, it is a crime to intentionally obstruct a governmental function. See 18 Pa. Cons. Stat. §5101. Similarly, it is a crime under the Pennsylvania Election Code to improperly interfere with an election officer in the execution of his or her duty. See 25 P.S. §3527. Both these crimes are misdemeanors. Thus, in order to make an arrest for one of these crimes, a warrant is required when the offense is not committed in the presence of the arresting officer. However, it is also a crime under Pennsylvania law for a Deputy Sheriff to refuse to obey a "demand" of a County Judge of Elections or to refuse to render such aid as the Election Judge requests in the making of arrests or in the keeping of the peace. See 25 P.S. §3511.

In this case, Mrs. Shoop was not creating a disturbance when the Deputies arrived. Thus, on the one hand, because Mrs. Shoop was peaceful when the Deputies arrived at the polls, Pennsylvania law required that they obtain a warrant before arresting her. On the other hand, the Deputies were bound by law to obey the "demand" from the County Election Judge to arrest and remove Mrs. Shoop "forthwith." The lack of clarity in Pennsylvania law placed the Deputies in a no-win situation. The conflict in Pennsylvania law forced the Deputies to chose between the risk of prosecution under 25 P.S. §3511 for failing to obey a demand of a County Election Judge and the risk of prosecution under 42 U.S.C. §1983 for making an arrest without a warrant. This amounts to no choice at all.

In view of the fact that there is no evidence that either the District Court or the Court of Appeals even considered the lack of clarity of the statutes at issue or the lack of applicable precedent, guidance from this Court is requested concerning the factors to be considered in determining when the law is so "clearly established" that qualified immunity from Sec-

tion 1983 liability may be denied.

B. The Lower Courts Require Guidance on the Issue of the Legal Effect of Direct Orders From Superior Officers and Members of the Judiciary in the Context of a Claim to Qualified Immunity From Civil Liability Under 42 U.S.C. §1983.

The leading case addressing the effect of probable cause determinations made by members of the judiciary in the context of Section 1983 claims is Malley v. Briggs, 475 U.S. 335 (1987). In Malley, police officers swore out a complaint based upon a wire tap. The complaint was then presented to a state judge accompanied by arrest warrants and supporting affidavits. The judge signed the warrants and the respondents were arrested. The charges were subsequently dropped when the grand jury failed to return an indictment. The respondents then brought an action under Section 1983 alleging that the application for the arrest warrants was improper and violated their rights under the fourth and fourteenth amendments. The police officers contended that they were entitled to absolute immunity on the ground that by applying for the arrest warrant, their conduct was reasonable per se. In holding that the police officers were entitled to only qualified immunity, the Malley court stated that "the qualified immunity defense . . . provides ample protection to all but the plainly incompetent or those who knowingly violate the law." Id. 335 U.S. at 341.

The facts of the instant case raise an issue that has not been, but should be, addressed by this Honorable Court. In Malley, the petitioner did not argue that the intercession of the judge, in issuing the warrant broke the causal link between the investigating officer's conduct and the allegedly unconstitutional arrest. As the court noted in Malley, 475 U.S. at 344 n. 7:

> Petitioner has not pressed the argument that in a case like this the officer should not be liable because the judge's decision to issue the warrant breaks the causal chain between the application of the warrant and the improvident arrest. It should be clear, however, that the District Court's "no causation" rationale in this case is inconsistent with our interpretation of §1983. As we stated in Monroe v. Pape, 365 U.S. 167, 187 (1961), §1983 'should be read against the background of tort liability that makes a man responsible for the natural consequences of his action.' Since the common law recognized the causal link between the submission of a complaint and an ensuing arrest, we read §1983

as recognizing the same causal link.

Id. 475 U.S. at 344 n.7. Because this issue was not "pressed" in Malley, it has never been formally addressed. While the common law recognized a causal link between the submission of a complaint and an ensuing arrest, no such causal link can be said to exist when an arresting officer is ordered to investigate, report the results of his investigation, and is then ordered to arrest. As then Justice Rehnquist, joined by Justice Powell, noted in their dissent:

> As Lord Mansfield stated two centuries ago: It is not fit that the receiving or judging of the information should be left to the discretion of the officer. The magistrate ought to judge; and should give certain directions to the officer. (Emphasis added.) (Citations omitted.)

Id. 475 U.S. at 352. In this instance, more than "direction" was given to the Deputies. A direct order to arrest and remove Evelyn Shoop was given to the Deputies by their immediate superior, purportedly from the on-duty Election Judge. Thus, the causal chain in Mrs. Shoop's arrest began at the Dauphin County Courthouse. Logically, the legal responsibility for Mrs. Shoop's arrest should end there as well. Again, as Justice Rehnquist noted in his dissent in Malley, "judicial evaluation of probable cause by a magistrate is the essential 'check point between the Government and the citizen. Steagald v. United States, 451 U.S. 204, 212 (1981)."' Malley, 475 U.S. at 352-353. The judicial evaluation of probable cause should also, therefore, represent the checkpoint between liability under a citizen's Section 1983 complaint and the government official ordered to carry out the judge's demand. The on-duty Election Judge's order, relayed by the Deputies' superior officer, constituted the instigating force behind Mrs. Shoop's arrest. Moreover, this order constituted a superseding intervening cause of any injuries Mrs. Shoop may have sustained. Furthermore, from a policy standpoint, if law enforcement officers are answerable in civil damages for carrying out the orders of their local judges, they are entitled to be apprised of that fact from this Court.

It is anticipated that Mrs. Shoop will contend that because the substance of the order issued by the County Election Judge is disputed, qualified immunity cannot apply. Mrs. Shoop is mistaken in this regard. The fact that a conflict exists as to the substance of the order issued from the County Election Judge is irrelevant to the application of qualified im-

munity to the Deputy Sheriffs. The objective reasonableness of their conduct must be based upon the objective information they possessed at the time of the arrest and this information included a "demand" from the on-duty Election Judge to arrest and remove Evelyn Shoop. Anderson, 483 U.S. at 641.

In view of the foregoing, the lower courts require guidance on the issue of the legal effect direct orders from superior officers and members of the judiciary.

C. The Lower Courts Require Guidance on the Standard of Liability Under 42 U.S.C. §1983 in the Context of an Allegedly Inadequate Investigation Prior to an Arrest.

In denying the Deputies' claim to qualified immunity, the District Court and by implication, the Court of Appeals, placed significant reliance upon the allegedly inadequate investigation that the Deputies performed prior to Mrs. Shoop's arrest. As the District Court noted in its decision:

> That the Deputies later received orders, supposedly from Judge Dowling, to remove Mrs. Shoop becomes almost irrelevant because any order would be based on Shroy and Fisher's inadequate assessment of the situation at the polls.

Appendix pp. 14a-15a.

In reaching this decision, the District Court relied upon BeVier v. Hucal, 806 F.2d 123 (7th Cir. 1986), for the proposition that an "inadequate" investigation may deprive law enforcement officers of a reasonable belief in probable cause and thereby deprive them of qualified immunity. In BeVier, the court found that virtually no investigation was performed by the arresting officer. In this instance, although the Deputies admit that not all available witnesses were interviewed, it is not clear that such an in-depth investigation is constitutionally required. In Gramenous v. Jewel Companies, Inc., 797 F.2d 432 (7th Cir. 1986), the same court that decided BeVier held that it was not constitutionally incumbent upon police to interview all available witnesses. Specifically, the court held:

> We conclude that the police need not automatically interview available witnesses, on pain of the risk that a jury will require them to pay damages. Good police practice may require interviews, but the Constitution does not require police to follow the best recommended practices.

> There is a gap, often a wide one, between the wise and the compulsory. To collapse those two concepts is to put the judicial branch in general superintendence of the daily operation of government, which neither the fourth amendment nor any other part of the Constitution contemplates.

Id. 797 F.2d at 442. Under BeVier the law enforcement officer may be held liable for failing to interview available witnesses. Under Gramenous, police need not automatically interview available witnesses. Despite the fact that witnesses were interviewed in this case, the District Court held that the Deputies could be held liable for performing an "inadequate" investigation. Accordingly, this Honorable Court's assistance is required to provide law enforcement officers with a degree of certainty concerning the standard of liability under Section 1983 in the context of an allegedly inadequate investigation prior to an arrest.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,
FOULKROD, REYNOLDS & HAVAS, P.C.

By: _____
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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 91 5103

EVELYN SHOOP; SUZETTE SHOOPE;
BRENDA WEBSTER,
Appellees

v.

DAUPHIN COUNTY;
WILLIAM H. LIVINGSTON, Sheriff of Dauphin County;
RICHARD SHROY, Deputy Sheriff of Dauphin County;
CHARLES C. FISHER, Deputy Sheriff of Dauphin County;
PENNSYLVANIA STATE POLICE;
RALPH G. MCALLISTER, State Police Trooper;
JUDITH A. VALLIER, State Police Trooper;

Dauphin County, William Livingston,
Richard Shroy, and Charles Fisher,
Appellants

Appeal From The United States District Court
For The Middle District of Pennsylvania
(D.C. civ. No. 89-01498)
District Judge: Honorable Sylvia H. Rambo

Argued: September 3, 1991

Before: BECKER and SCIRICA, Circuit Judges, and
VANARTSDALEN, District Judge*

---

*. Honorable Donald W. VanArtsdalen, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

JUDGMENT ORDER

After consideration of all contentions raised by the appellant, it is ADJUDGED AND ORDERED that the order of the district court be and is hereby affirmed.

Parties to bear their own costs.

BY THE COURT,

Circuit Judge

ATTEST:

Sal Mrvos, Clerk

DATED: SEP 6 1991

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

EVELYN 8HOOP,	:	CIVIL ACTION NO.
SUZETTE SHOOP	:	3:CV-89-1498
and BRENDA WEBSTER,	:	
Plaintiffs	:	
	:	
v.	:	
	:	
DAUPHIN COUNTY: WILLIAM	:	
LIVINGSTON, SHERIFF OF	:	
DAUPHIN COUNTY; RICEARD	:	
SHROY and CHARLES C.	:	
FISHER, DEPUTY SHERIFFS OF	:	
DAUPHIN COUNTY; STATE	:	
POLICE TROOPER RALPH	:	
McALLISTER; and JUDITH A.	:	
VALLIER,	:	
Defendants	:	

MEMORANDUM

Defendants Ralph McAllister and Dauphin County, William Livingston, Richard Shroy and Charles Fisher (the county and Livingston, Shroy and Fisher will collectively be referred to as the "Dauphin defendants") have filed motions for partial summary judgment. The motions have been fully briefed. The court will address the two motions together.

Background

Many of the facts which provide the basis for this case are in dispute. In detailing the factual background the court will recite undisputed facts, and when necessary, identify and state portions of the chronology which are in dispute. On the morning of November 3, 1987, election day, Dauphin County deputy sheriffs Richard Shroy and Charles Fisher ar-

rived at the Fisherville Fire Hall, a Dauphin County polling place. According to Shroy and Fisher, they went to the fire hall pursuant to a verbal order of Dauphin County Court of Common Pleas Judge Jack Dowling to investigate a possible disturbance at the polls. Plaintiffs deny the existence of a court order, and contend that the deputies were acting only on the orders of the Sheriff's department. Upon arrival, Shroy and Fisher found the fire hall calm. They asked a third deputy, James Hallman, who had been present at the fire hall the bulk of the morning, if there had been any disturbances. Hallman replied that there had been a number of sharp comments traded between plaintiff Evelyn Shoop ("Mrs. Shoop"), a poll watcher, and several of the other elections officials. Much of the hubbub centered on Evelyn Shoop's belief that the Judge of Elections, Judy Vallier, had been permitting her parents to vote in local elections when they did not reside in the district. Shroy and Fisher then spoke to Vallier, who told them that Evelyn Shoop had been making unsavory comments toward some of the people at the fire hall, and that because of Mrs. Shoop's conduct the election board was threatening to walk out.

Deputy Fisher then left the polling area and called the sheriff's office to relate what he had heard and to obtain further orders. The Dauphin defendants assert that Fisher spoke with Chief Deputy Sheriff Carmen Henderson, who relayed Fisher's information to Judge Dowling. Judge Dowling then, according to the Dauphin defendants, ordered Henderson to have Mrs. Shoop removed from the polling place. Plaintiffs vigorously dispute this assertion, and counter that Judge Dowling never gave any order, but that Henderson did issue an "illegal" order to the deputies.

Fisher went back to the fire hall and advised Mrs. Shoop that the court had ordered her to leave the premises. Mrs. Shoop refused to move until she was shown a written order. Fisher then left the hall again and, he states, called the sheriff's office to reconfirm his orders. Thereupon he returned to the hall and, along with Shroy, attempted to physically remove Mrs. Shoop. A scuffle ensued.

After this altercation, the defendant deputies retreated, and defendant Ralph McAllister, a state trooper, arrived. McAllister spoke with the deputies, who related their versions of what happened. McAllister noted that Fisher had bite marks on his hand while Shroy had a cut lip. The trooper attempted to ask Mrs. Shoop to leave, and when she refused, McAllister placed her under arrest, charging her with assault and resisting arrest.

Another struggle ensued between Suzette Shoop and Brenda Webster and the deputies, and they too were arrested. McAllister then drove plaintiffs to Troop H headquarters, where their arrests were processed.

Plaintiffs Evelyn Shoop and Brenda Webster complained of pain resulting from the struggles which took place at the fire hall. They were eventually taken to a hospital and examined.

The three plaintiffs filed this suit pursuant to 42 U.S.C. § 1983, claiming that their constitutional rights were violated because they were arrested without probable cause and the officers involved used unnecessary force to arrest them. Webster and Mrs. Shoop further claim that they were unconstitutionally denied medical care while in the custody of the state police. All three plaintiffs filed pendent state law claims.

After the close of discovery, defendants have filed their motions for partial summary judgment.

Discussion

The standards for the award of summary judgment under Federal Rule of Civil Procedure 56 are well known. As the Third Circuit Court of Appeals recently capsulized:

> Summary judgment may be entered if "the pleadings, deposition[s], answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); Equimark Comm. Finance Co. v. C.I.T. Financial Serv. Corp., 812 F.2d 141, 144 (3d Cir. 1987). If evidence is "merely colorable" or "not significantly probative" summary judgment may be granted. Anderson, 106 S.Ct at 2511; Equimark, 812 F.2d at 144. Where the record, taken as a whole, could not "lead a rational trier of fact to find for the nonmoving party, summary judgment is proper." Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 106 S. Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

Hankins v. Temple Univ., 829 F.2d 437, 440 (3d Cir. 1987). Once the moving party has shown that there is an absence of evidence to support the claims of the nonmoving party, the nonmoving party may not simply sit back and rest on the allegations in his complaint, but instead must "go beyond the pleadings and by her own affidavits, or by the

'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.' " Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). The court will consider the parties' motions under these standards.

1. Defendant McAllister

A. Failure to Provide Adequate Medical Care

McAllister asserts that plaintiffs have shown no facts from which, as a matter of law, one could conclude that McAllister violated Webster's and Evelyn Shoop's rights to adequate medical care under the due process clause of the fourteenth amendment. Plaintiffs respond essentially by stating that adequate care was not given.

To state a claim under § 1983 for the failure to provide adequate medical care to one in pretrial detention, the behavior of the officer must rise to the level of deliberate indifference to a serious medical need. Dayton v. Sapp, 668 F. Supp. 385, 388 (D. Del. 1987) (citing Estelle v. Gamble, 429 U.S. 97 (1976)); Boring v. Kozakiewicz, 833 F.2d 468, 471-473 (3d Cir. 1987) (discussing, without resolving, the difference in the "deliberate indifference" standard as applied to pretrial detainees and convicted prisoners), cert. denied, 485 U.S. 991 (1988). Here, even adopting plaintiffs' own characterizations, the court cannot say that Webster's and Shoop's medical needs were serious, or that Trooper McAllister was "indifferent" to them.

First, unless a medical condition is obviously "serious" to the layman, a plaintiff must submit expert testimony as to the seriousness of the problem. Borina, 833 F.2d at 473-74. Plaintiff Webster stated that her "back is what she went to the hospital for because that is what hurted [sic] at the time." Deposition of Brenda Webster at 25. Webster sustained no broken bones, id. at 28, and her deposition discloses no type of injury that would be obvious to a layman. Further, she was treated and released from the emergency room of Community General Osteopathic Hospital, a fact which tends to show that her injuries were not "serious." Id. at 28-29. Webster has offered no expert testimony or opinions which would prove that, after her arrest, her injuries were, if not obvious to a layman, nevertheless serious to a degree that immediate medical attention was required.

Similarly, Evelyn Shoop's injuries are not of such an obviously serious nature as to have required more speedy medical attention

than that which was administered. Mrs. Shoop admits that black and blue bruises did not appear until several days after her arrest. Deposition of Evelyn Shoop at 30-31. Her shoulder and wrists hurt and she was evidently diagnosed as having a mild concussion. However, these are not the types of injuries obvious to a layman as requiring immediate medical attention absent some other outward indicia, such as nausea or disorientation. Plaintiffs do not point out any such manifestations, and the court's own search of the record could find none. Moreover, like Webster, Mrs. Shoop has submitted no expert opinion showing that her condition at the time directly after the arrest was "serious."

Second, there is no evidence that McAllister was "deliberately indifferent" to a medical need. Though, while being processed at state police headquarters, Evelyn Shoop and Webster evidently complained of soreness in their wrists and were, as a result not fingerprinted, Deposition of Ralph McAllister at 19-20, Webster did not state that she told McAllister that her back hurt or that she wanted to go to the hospital because of pain in her back. Webster Deposition at 25. She did, however, complain of pain in the presence of two other troopers, but could not say that it was because of these complaints that she was taken to the hospital. Id. at 26. Plaintiffs present no evidence that these officers informed McAllister that Webster was in pain. Thus, it is not at all apparent that Webster ever made clear to defendant McAllister that she needed treatment.

Moreover, both Webster and Mrs. Shoop were indeed taken to the hospital, and both were treated. Evelyn Shoop estimated that the time between their arrival at state police headquarters and their departure for the hospital was "probably an hour." Evelyn Shoop Deposition at 143. She thought that the ride from the fire hall to the station took perhaps 45 minutes. Id. at 193. Therefore, at the most, plaintiffs Webster and Mrs. Shoop were deprived of medical attention for an hour and 45 minutes, a not unreasonable period considering the non-obvious nature of plaintiffs' injuries.

Consequently, Webster and Evelyn Shoop due process rights under the fourteenth amendment were not violated by the wait for medical care, as they have established neither a "serious condition" nor a "deliberate indifference" to such a condition by defendant McAllister.

B. **Qualified Immunity**

Defendant McAllister asserts that he is entitled to qualified immunity against any liability which may accrue to him for arresting plaintiffs without probable cause and without a warrant.

Courts have granted public officials performing discretionary functions qualified immunity from civil liability "insofar as their conduct does not violate clearly established statutory or constitutional rights which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Here, the question is not whether McAllister actually had probable cause to arrest plaintiffs, but whether his belief that he had probable cause was objectively reasonable in light of the circumstances at the time of the arrest and that his conduct did not violate any clearly established laws. Anderson v. Creighton, 483 U.S. 635, 641 (1987).

Although the court believes that McAllister, through his conversations with the other officers in attendance and corroborating physical evidence, did reasonably believe that he had probable cause to arrest Mrs. Shoop, the court also believes that McAllister should have obtained a warrant to arrest Mrs. Shoop. Pennsylvania law requires that officers secure a warrant to arrest a suspect absent the existence of clearly defined exigent circumstances. For instance, an officer may arrest a suspected felon in a public place without a warrant, see United States v. Watson, 423 U.S. 411 (1976), or an officer may arrest a person on a misdemeanor charge when he observes the misdemeanor. See Cambist Films, Inc. v. Duggan, 475 F.2d 887 (3d Cir. 1973). McAllister's arrest of Mrs. Shoop fits into neither of these exceptions, as he personally did not witness her fight with the deputies and the charges on which he argued that he had probable cause — assault and resisting arrest — are misdemeanors in Pennsylvania. See 18 Pa. Cons. Stat. Ann. § 2702 (a)(3) and (b) and § 5104 (Purdon 1983).[1] Therefore, McAllister should have procured a warrant before arresting Mrs. Shoop, and since he did not, he is not within the protections of qualified immunity with regard to the arrest of Mrs. Shoop.

The situations of Brenda Webster and Suzette Shoop present a different problem with regard to McAllister's objective assessments of probable cause. McAllister asserts, and other witnesses in depositions have corroborated, that Suzette Shoop and Webster physically attacked sheriff's deputies as they placed Evelyn Shoop in the state police car.[2] In their statement of material facts, plaintiffs deny that Suzette and Webster did this, and further state that "[t]he other Plaintiffs (Suzette and

Webster) were attempting to prevent Mrs. Shoop from being beaten by the police."

As stated earlier in this memorandum, a party opposing a summary judgment motion may not merely rest on pleadings or denials in attempting to defeat the motion. See Fed. R. Civ. P. 56(e). The nonmoving party must go beyond the pleadings to submit contrary evidence pursuant to rule 56(c) of the Federal Rules of Civil Procedure in order to create a material issue of fact. See Celotex v. Catrett, 477 U.S. 317, 322-24 (1986). In opposing this motion, plaintiffs have not directed the court to affidavits, deposition testimony, interrogatories or admissions on file which would dispute McAllister's assertion that Suzette Shoop and Brenda Webster had attacked the deputies.

However, the court has, through its own review of the record, uncovered statements by Suzette in her deposition denying that she ever physically assaulted any officers that day. Deposition of Suzette Shoop at 103. While, as far as the court can determine, it was not plaintiffs who submitted the deposition transcript to the court, it would defeat the purpose of summary judgment — to "isolate and dispose of factually unsupported claims or defenses," Celotex, 477 U.S. at 323-24 — to grant summary judgment with regard to Suzette Shoop only because the denial of McAllister's factual assertion was not properly submitted to the court by her attorneys.

The court, however, could find no version of the facts proferred by Webster which contradicts McAllister's with regard to the events leading to her arrest for assault and resisting arrest. Therefore, the court finds that, given the facts before it, McAllister could reasonably have be-

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1. The court notes that Mrs. Shoop was also charged under 18 Pa. Cons. Stat. Ann. § 2702(a)(1) and (2) (Purdon's 1983), which requires the person to have inflicted, or attempted to inflict, "serious bodily harm" on a police officer or other person. Violation of these sections constitutes a felony. Without delving into whether a deputy sheriff is a "police officer" for the purpose of section (a)(2), the court feels that, given the relatively minor nature of the deputies injuries, the size differential between them and Mrs. Shoop, and the fact that Mrs. Shoop had no weapon, McAllister could not seriously believe that the deputies suffered "serious bodily harm."

2. Note that McAllister states that he actually saw these actions firsthand, and is therefore within one of the exigent circumstances for a warrantless arrest.

lieved that he had probable cause to arrest Brenda Webster due to her attack of the deputies in § 1983 claim arising from her allegedly illegal arrest. The regard to Suzette Shoop, her deposition raises a material issue of fact relating to whether she attacked the deputies, and summary judgment is thus not appropriate on the issue of qualified immunity.

C. Immunity Against State Claims

Defendant McAllister argues that he is statutorily immune from suit with regard to plaintiffs' pendent state law claims of false imprisonment, assault and battery, malicious abuse of legal process and intentional infliction of emotional distress. The Pennsylvania General Assembly, after the judicial abolition of sovereign immunity by the Pennsylvania Supreme Court in Mayle v. Pennsylvania Dep't of Highways, 479 Pa. 38, 388 A.2d 709 (1978), reaffirmed by statute the concept of immunity for the Commonwealth and its employees. The statute, which permits but a few narrow exceptions to the rule of immunity, reads:

> Pursuant to section 11 of Article I of the Constitution of Pennsylvania, it is hereby declared to be the intent of the General Assembly that the Commonwealth, and its officials and employees acting within the scope of their duties, shall continue to enjoy sovereign and official immunity and remain immune from suit except as the General Assembly shall specifically waive the immunity. When the General Assembly specifically waives sovereign immunity, a claim against the Commonwealth and its officials and employees shall be brought only in such manner and in such courts and in such cases as directed by the provisions of Title 42 . . . unless otherwise specifically authorized by statute.

1 Pa. Cons. Stat. Ann. § 2310 (Purdon Supp. 1990). According to the clear language of the statute, not only the Commonwealth but also its employees and officials are entitled to immunity. "In other words, if the Commonwealth is entitled to sovereign immunity under Act 152, then its officials and employees acting within the scope of their duties are likewise immune." Moore v. Commonwealth, 114 Pa. Commw. 56, 538 A.2d 111, 115 (1988), appeal dismissed sub nom. Moore v. Reid, 567 A.2d 1040 (1990).

The General Assembly has provided in a different section nine enumerated, exclusive exceptions to this general grant of immunity. The exceptions are for negligent acts involving: 1) the operation of a motor

vehicle in the control or possession of a Commonwealth party; 2) health care employees; 3) care, custody or control of personal property; 4) Commonwealth-owned property; 5) potholes or other dangerous conditions; 6)care, custody or control of animals; 7) liquor store sales; 8) National Guard activities and 9) toxoids and vaccines. 42 Pa. Cons. Stat. Ann. § 8522 (Purdon 1982).

Here, there appears no doubt that Trooper McAllister was acting within the scope of his duties as a state police officer —an employee of the state. See Lynch v. Johnston, 76 Pa. Commw. 8, 463 A.2d 87, 90 (1983) ("[I]t goes without saying that state police are authorized to make arrests."). Indeed, immunity has been previously upheld for Commonwealth law enforcement officers by the courts of the state. See, e.g., Lynch; Borosky v. Commonwealth, 46 Pa. Commw. 252, 406 A.2d 256 (1979) (immunity upheld against claim versus Commonwealth for alleged false arrest by state troopers). Moreover, none of the § 8522 exceptions applies to the circumstances submitted to the court.

Plaintiffs appear to argue that since they are alleging the commission of intentional torts by McAllister that the statutory immunity does not apply. This is not the correct conclusion. In Yakowicz v. McDermott, 120 Pa. Commw. 479, 548 A.2d 1330 (1988), appeal denied, 523 Pa. 644, 565 A.2d 1168 (1989), the Commonwealth Court of Pennsylvania considered whether, in a defamation action against a state employee, immunity does not apply because of the intentional nature of the tort. The court specifically distinguished the immunity for an employee of the Commonwealth versus the immunity conferred by statute upon the employee of a municipality:

> We note that the immunity defense provided by the General Assembly to local agencies and their employees in 42 Pa.C.S. §§ 8541-8564 is lost to local agency employees where their actions which cause injury constitute a "crime, actual fraud, actual malice or willful misconduct." 42 Pa.C.S. § 8550. This would permit a defamation action based on malicious publication to be brought against a local agency employee . . . . The General Assembly has not included any such abrogation of the immunity provided to Commonwealth agency employees.

Yakowicz, 548 A.2d at 1334 n.5. Thus, despite the fact that the torts plaintiffs have pleaded against McAllister require a level intent, McAllister is still within the umbrella of immunity provided by the statute.

II. Defendants Dauphin County, Shroy, and Fisher

A. Legality of Arrest/ Qualified Immunity

Like McAllister, defendants Shroy and Fisher argue that plaintiffs' § 1983 claims against them, insofar as they allege an arrest without a warrant or probable cause, are ripe for summary judgment because the uncontroverted record shows either that they did have probable cause to arrest plaintiffs or that they are protected by qualified immunity.[3] The court will consider these two issues together, as both center on events either leading to the formation of actual probable cause for the deputies or the reasonable belief that they had probable cause.

An important preliminary point is that the briefs of both sides appear to lump the arrests of all of the plaintiffs together for the purposes of the determination of probable cause or the reasonable belief of probable cause. This creates some confusion, as there are essential differences between the circumstances surrounding the arrests of Evelyn Shoop and those of Brenda Webster and Suzette Shoop. The deputies were allegedly sent to remove Evelyn Shoop from the polling place, and then attempted to arrest her when she did not comply. Later, she was placed under arrest and processed by the state police through Trooper McAllister on charges of obstructing the administration comply. Later, she was placed under arrest and processed by the state police through Trooper McAllister on charges of obstructing the administration of a governmental function, assault and resisting arrest. Brenda Webster was not the subject of any court order, but was apparently handcuffed and placed in the deputies' squad car when she allegedly became disruptive upon the deputies' first try at arresting Mrs. Shoop. Later, she returned to the polls, and was arrested after she allegedly physically attacked sheriff's deputies when they and other officers were arresting Mrs. Shoop a second time. Webster was processed by the state police on assault and resisting arrest charges. Suzette Shoop was apparently arrested only for allegedly attacking, along with Webster, officers as Mrs. Shoop was being placed in a state police car.

With regard to Mrs. Shoop's arrest, the facts which are established without contradiction do not establish probable cause or reason-

3. See supra pp. 8-9 for a discussion of the standards for qualified immunity.

able belief in probable cause on the part of the deputies sufficient to award qualified immunity for the arrest. Shroy and Fisher assert that they were dispatched to the polling place pursuant to an oral order given by Judge Dowling. When the deputies arrived, they spoke only to Deputy Hallman and Judith Vallier. Hallman had been stationed at the fire hall throughout the morning and had evidently seen no disturbances sufficient to remove any parties. Deposition of James Hallman at 23-36. Vallier's parents were the parties who had complained to Judge Dowling in the first place. Fisher then apparently called the Sheriff's Department twice. The first order he received from headquarters directed him and Shroy to remove Mrs. Shoop; the second reconfirmed the first. They subsequently attempted to arrest Mrs. Shoop, and a scuffle, the facts of which are in dispute, erupted.

These facts are not sufficient to establish probable cause or even the reasonable belief that probable cause existed. First, the scope of Judge Dowling's original order is still in dispute, and needs to be resolved by a finder of fact. Even according to defendants' version of the facts, however, the deputies were sent to the polls to "ascertain whether there was a disturbance," not strictly to remove Mrs. Shoop. Brief of Defendants Dauphin County, et al. in Support of Motion for Partial Summary Judgment at 6. This court is not prepared to hold, as Dauphin defendants urge, that an oral "order" of court, passed on to an officer through another officer back at the station, is the equivalent of an arrest warrant issued by a neutral judge after viewing affidavits and the like to determine probable cause. In ascertaining the situation at the polls, Shroy and Fisher spoke to only two individuals, a deputy who had not seen fit to intervene himself and Judith Vallier, who had a definite interest and a possible bias in seeing Mrs. Shoop removed. Importantly, there were many other witnesses handy, including Roberta Rarper, who has stated that Mrs. Shoop was not disruptive. Deposition of Roberta Karper at 12-23. That the deputies later received orders, supposedly from Judge Dowling, to remove Mrs. Shoop becomes almost irrelevant because any order would be based on Shroy and Fisher's inadequate assessment of the situation at the polls. See Be Vier v. Hucal, 806 F.2d 123 (7th Cir. 1986) (state trooper's assessment of probable cause for child neglect, when he engaged in no investigation other than his immediate assessment of the scene, was both wrong and unreasonable). Moreover, at the time the deputies arrived at the fire hall, things appeared to be fairly calm, and thus they had no real immediate need to escort Mrs. Shoop from

the polls.

The arrests of Brenda Webster and Suzette Shoop present a different set of facts for the consideration of probable cause or qualified immunity. As the court understands it, these two were arrested for attacking officers attempting to arrest Mrs. Shoop. The same reasoning which applies to the determination of probable cause to arrest these two plaintiffs by Trooper McAllister, see supra pp. 10-12, applies to plaintiffs here. A material issue of fact is created by the testimony of Suzette Shoop; Brenda Webster fails to go beyond the pleadings as required by Federal Rule of Civil Procedure 56(e). Therefore, summary judgment will be granted as to Shroy and Fisher's immunity from Webster's claim for illegal arrest. As a material issue of fact exists with regard to Suzette's claims, immunity may not be granted through summary judgment.

B. Liability of Dauphin County Under § 1983

Defendant Dauphin County cannot be held liable in a § 1983 action solely on the basis of respondeat superior. Monell v. Department of Social Servs., 436 U.S. 658, 691-95 (1978). A municipal body such as the county is subject to liability only if the allegedly unconstitutional acts either "implement[] or execute[] a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers" or is "visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels." Id. at 690-91.

Even if a policy is not formally established its existence for the purpose of § 1983 liability may be inferred "from informal acts or omissions of supervisory municipal officials." Estate of Bailey by Oare v. County of York, 768 F.2d 503, 506 (3d Cir. 1985) (citation omitted). The conduct of a single low level officer may not establish an "official policy." Oklahoma City v. Tuttle, 471 U.S. 808, 821-24 (plurality opinion) (1985).

In the present case, plaintiffs base their claims for municipal liability on allegations that the Sheriff's Department failed to supervise and discipline deputies and failed to give them proper training, resulting in the creation of a policy of encouraging constitutional violations by deputies.

The failure to supervise and discipline allegations do not support a cause of action. The Third Circuit has narrowly circumscribed

the situations where supervisory approval of unconstitutional conduct may lead to liability on the part of a municipality, suggests that, at a minimum, liability vests only where the official has " '1) contemporaneous knowledge of the offending incident or knowledge of a prior pattern of similar incidents, and 2) circumstances under which the supervisor's inaction could be found to have communicated a message of approval to the offending subordinate.' " Colburn v. Upper Darby Township, 838 F.2d 663, 673 (3d Cir. 1988) (quoting Chinchello v. Fenton, 805 F.2d 126, 133 (3d Cir. 1986)). Plaintiffs do not appear to argue that there was a continuing pattern of violations by the Sheriff's Department, and has offered no evidence to that effect. Therefore, plaintiff may not pursue § 1983 claim based on this theory.

Dauphin County also argues that plaintiffs' theory of inadequate training similarly fails to establish the potential liability of the County for the actions of the deputies. The county cites Krisko v. Oswald, 655 F. Supp. 147, 152 (W.D. Pa. 1988) and Colburn, 838 F.2d at 673 as standing for the proposition that a municipality may not be held liable for a constitutional violation for failure to train employees. In Colburn, however, the Third Circuit specifically stated that it did mean to "suggest that there are no circumstances in which a deficient training policy can form the basis for municipal liability under section 1983," and cited the opinion of four Supreme Court justices who voted not to dismiss the writ of certiorari in a case where liability of a city had been upheld on the basis of a grossly negligent training policy. Colburn, 838 F.2d at 672 (citing City of Springfield v. Kibbe, 480 U.S. 257 (1987) (O'Connor, J., joined by Rehnquist, C.J., White, J., and Powell, J., dissenting from dismissal of writ of certiorari to Kibbe v. City of Springfield, 777 F.2d 801 (lst Cir. 1985)).

Here, the court believes that plaintiffs have produced sufficient evidence to at least create a factual question as to whether the County and the Sheriff's Department was grossly negligent in the training of its deputies sufficient to establish § 1983 liability. Sheriff William Livingston has testified in his deposition that there is no specific written internal plan or procedure for training deputies such as Shroy and Fisher, and that deputies are not given any legal training. Deputies are not trained in how to restrain people. Their investigative training is evidently limited to referring questions to the county solicitor. Part time deputies receive on the job training. Livingston did state, however, that full time deputies attend a four week course pursuant to the Deputy Sheriff's Training Act, and newer dep-

uties are paired with veterans as part of their initial training. See Deposition of William Livingston at 13-20. Therefore, summary judgment is not appropriate on this issue.

C. Intentional Infliction of Emotional Distress

The Dauphin defendants also argue that they are due summary judgment on plaintiffs' state law intentional infliction of emotional distress claim. In its memorandum of April 11, 1990, this court stated that it believed that the Commonwealth of Pennsylvania recognized the tort of intentional infliction of emotional distress, but that required that plaintiffs submit competent medical evidence that the emotional distress exists to support a claim under the tort.

Plaintiffs have submitted no such evidence. The only submission even approximating "competent medical evidence" is a brief letter by a physician to Suzette Shoop stating that Suzette had a skin rash and was prescribed a cortisone cream. There is no discussion of emotional distress causing the condition. This letter does not satisfy the law of Pennsylvania or the April 11, 1990 order of this court. Accordingly, Dauphin defendants' motion for summary judgment on this issue will be granted.[4]

D. Malicious Prosecution

The county defendants argue that plaintiffs have not presented sufficient evidence to raise a cause of action for plaintiffs' pendent state law claim of malicious prosecution. The Restatement (Second) of Torts defines the tort of "malicious prosecution" — the malicious initiation of criminal proceedings — as such:

A private person who initiates or procures the institution of criminal proceedings against another who is not guilty of the offense charged is subject to liability for malicious prosecution if

(a) he initiates or procures the proceedings without probable cause and primarily for a purpose other than that of bringing an offender to justice, and

(b) the proceedings have terminated in favor of the accused.

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4. As defendant McAllister is immune from state tort law claims, the disposition of these state law issues is moot with regard to him.

Restatement (Second) of Torts § 653 (1976); Bruch v. Clark, 352 Pa. Super. 225, 507 A.2d 854, 856 (1986). Public prosecutors, such as district attorneys, are accorded absolute immunity from liability. Peace officers are not. Restatement (Second) of Torts § 656 comment d (1976).

The Dauphin defendants argue that defendants Shroy and Fisher are not subject to liability for this tort because they were not the officers who issued the complaint. This is too narrow a reading of the term "initiate." Shroy and Fisher were intimately involved with the criminal proceedings against Mrs. Shoop from beginning to end. This is sufficient to say that they "initiated" the proceedings along with others.

The county defendants also argue that plaintiffs have not shown a motive other than the administration of justice for the bringing of the prosecution. Indeed, plaintiffs have failed to direct the court to any evidence that the deputies instituted the proceedings for an improper purpose. However, the Restatement indicates that the initiation of prosecution without probable cause is evidence that there was an improper purpose behind the prosecution. Restatement (Second) of Torts § 669 (1976). Simpson v. Montaomerv Ward & Co., 165 Pa. Super. 408, 68 A.2d 442, 446 (1949). Pennsylvania courts have softened the probable cause standard in such a situation to whether "the facts and circumstances convince the defendant 'as a reasonable, honest and intelligent human being, that the suspected person is guilty of a criminal offense.'" Bruch, 507 A.2d at 857 (quoting Neczvpor v. Jacobs, 403 Pa. 303, 169 A.2d 528, 531 (1961)). Here, the court has previously found in this memorandum that Shroy and Fisher lacked a reasonable basis for believing that they had probable cause to arrest Mrs. Shoop in the context of qualified immunity. See supra pp. 16-18. Therefore, although the lack of probable cause offers only slight, inferential evidence, the court feels it is enough to make the existence of illegitimate purpose behind the prosecution of Mrs. Shoop an issue for the jury with regard to the two deputies.

Note that this portion of the opinion applies only to Evelyn Shoop. With regard to Brenda Webster, the court, as stated earlier in the memorandum, granted summary judgment in favor of defendants as to the issue of the existence of probable cause for her arrest. For Suzette Shoop, in whose case a material issue of fact exists, she may still state a claim for malicious prosecution if it is found by the fact finder that she had not at-

tacked the officers and the officers had not probable cause to arrest her. Therefore, the court will grant the summary judgment motion as it applies to Brenda Webster on this issue of malicious prosecution, but not as to Evelyn and Suzette Shoop.

SYLVIA H. RAMBO
United States District Judge

Dated: January 22, 1991.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

EVELYN 8HOOP,	:	CIVIL ACTION NO.
SUZETTE SHOOP	:	3:CV-89-1498
and BRENDA WEBSTER,	:	
Plaintiffs	:	
	:	
v.	:	
	:	
DAUPHIN COUNTY: WILLIAM	:	
LIVINGSTON, SHERIFF OF	:	
DAUPHIN COUNTY; RICEARD	:	
SHROY and CHARLES C.	:	
FISHER, DEPUTY SHERIFFS OF	:	
DAUPHIN COUNTY; STATE	:	
POLICE TROOPER RALPH	:	
McALLISTER; and JUDITH A.	:	
VALLIER,	:	
Defendants	:	

ORDER

Pursuant to the accompanying memorandum, **IT IS HEREBY ORDERED THAT:**

1) Defendant Ralph McAllister's motion for partial summary judgment is **GRANTED**

a) regarding plaintiffs' § 1983 claim for failure to provide inadequate medical care;

b) regarding the availability of sovereign immunity to McAllister against plaintiffs' state law claims;

c) regarding plaintiff Webster's § 1983 claims for illegal arrest, as McAllister is entitled to qualified immunity;

and

2) Defendant Ralph McAllister's motion for partial summary judgment is **DENIED**

a) regarding plaintiffs Suzette and Evelyn Shoop's § 1983 claims for illegal arrest, as qualified immunity does not apply.

3) Defendants Dauphin County, Richard Shroy, William Livingston and Charles Fisher's motion for partial summary judgment is **GRANTED**

a) regarding plaintiffs' claims for intentional infliction of emotional distress;

b) regarding plaintiff Webster's claims for malicious prosecution;

and is **DENIED** in all other respects.

4) The Clerk of Court is directed to defer the entry of summary judgment until the conclusion of the case.

SYLVIA H. RAMBO
United States District Judge

Dated: January 22, 1991.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 91 5103

EVELYN SHOOP; SUZETTE SHOOPE;
BRENDA WEBSTER,
Appellees

v.

DAUPHIN COUNTY;
WILLIAM H. LIVINGSTON, Sheriff of Dauphin County;
RICHARD SHROY, Deputy Sheriff of Dauphin County;
CHARLES C. FISHER, Deputy Sheriff of Dauphin County;
PENNSYLVANIA STATE POLICE;
RALPH G. MCALLISTER, State Police Trooper;
JUDITH A. VALLIER, State Police Trooper;

Dauphin County, William Livingston,
Richard Shroy, and Charles Fisher,
Appellants

(D.C. civ. No. 89-01498)

8UR PETITION FOR PANEL REHEARING
WITH SUGGESTION FOR REHEARING IN BANC

PRESENT: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMAN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, and ROTH, Circuit Judges and VANARTSDALEN, District Judge

*. The Honorable Donald W. VanArtsdalen, United States District Judge for the Eastern District of Pennsylvania, sitting by designation, as to panel rehearing only.

The petition for rehearing filed by Appellant, having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

BY THE COURT:

_____

Circuit Judge

DATED : October 4, 1991